

**IN THE DISTRICT COURT OF GUAM  
TERRITORY OF GUAM  
CIVIL MINUTES  
GENERAL**

CASE NO.: CV-04-00006

DATE: September 21, 2007

CAPTION: Santos -vs- Camacho

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HON. FRANCES M. TYDINGCO-GATEWOOD, Chief Judge, Presiding

Law Clerk: Kim R. Walmsley / Sara Weber

Court Recorder: Leilani Toves Hernandez

Courtroom Deputy: Leilani Toves Hernandez

Electronically Recorded: 9:06:26 - 10:21:08

10:42:48 - 11:47:09

1:26:08 - 2:43:27

3:03:26 - 4:00:35

CSO: N. Edrosa / P. Taijeron

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**APPEARANCES:**

Counsel for Plaintiff(s)

M. Phillips / L. Travis / D. Invencion - Petitioner Santos

P. Perez / D. Lujan - Petitioner Torres

N. Pacharzina / T. Fisher / J. Canto - Objector's Simpao and Cruz

Counsel for Defendant(s)

D. Benjamin - Felix Camacho, Governor of Guam

R. Mantanona - L. Perez, Director of Administration

and A. Ilagan, Director of Dept. of Revenue and Taxation

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**PROCEEDINGS: Continued Fairness Hearing**

- Objector's Exhibit A submitted to the Court.
- Parties were instructed to submit their Findings of Fact and Conclusion of Law by 10/19/2007.
- In addition, parties shall submit their briefs regarding attorney's fees by 10/12/2007
- Hearing on Attorney's Fees will be held on October 22, 2007 at 9:00 a.m.

NOTES:

# Objections to the Proposed Settlement

Class Members Janice Cruz and  
Mary Grace Simpao



# Court's Duty and Role In Reviewing Settlement

- Fiduciary and guardian of rights for all absent class members
- High degree of vigilance
- Compare value of claims to proposed settlement amount in light of risks of litigation.
- Cannot rewrite settlement

# Standards for Final Approval

- Fair, reasonable and adequate
- Heightened scrutiny when settlement presented prior to certification
- Preliminary approval does not constrain the Court
- Passivity of class members does not indicate approval

# Court's Discretion

- Review is Abuse of Discretion
- Except . . .
  - Adequacy of notice to meet due process is *de novo* review. *Torrissi*, 9<sup>th</sup> Cir.
  - Individualized notice is required where practicable. Rule 23(c)(2); *Eisen*, S.Ct.
  - The Court must show it had adequate facts and performed a rigorous review. *Mandujano*, 9<sup>th</sup> Cir.

# What's wrong with this settlement ?

- Inadequate Notice
- Disparate Treatment of Class Members
- Overall Unfairness
- Illegal and Uncertain Funding Mechanism

# Inadequate Notice

- What is at stake here?
  - Extinguishing claims w/an average value of \$1900
  - Due Process NOT simple fairness
  - *De novo* review

When notice is a person's due, process which is a "mere gesture" is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it

*Eisen v. Carlisle*, 417 U.S. 156 (1949)

# The record on adequacy of notice

- Unchallenged expert opinion says notice was not best practicable.
- Dismal response

<u>Tax Year</u>	<u>Notice Claims Rate</u>
2004	77%
2003	27%
2002	25%
2001	24%
2000	23%
1999	20%
1996	13%
1995	14%
<u>Avg</u>	<u>23%</u>



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2012/040

[illegible]

**If you bought XYZ Corp. stock in 1999, you could get a payment from a class action settlement.**

**Para una notificación en Español, llamar o visitar nuestro website.**

[illegible]

100

[illegible]

Contact your broker to see if you hold shares of XYZ stock. If you're not, you can get more information, including a detailed notice, at [www.XYZoffshore.com](http://www.XYZoffshore.com) or by calling toll free 1-800-100-0000.

### What's the Answer?

[illegible]

### Why does the Sarmienta Pass?

XYZ agreed to create a fund of \$6.99 million to be divided among all Class Members who used its valid claims forms. A full financial statement, available at the website below, describes

all of the date is above the proposed settlement.

## How do you Aim for a Patient?

A detailed notice and claim form package contains everything you need. Just call or visit the website below to get one. To qualify for a payment, you must send in a claim form. Claims are due by March 31, 2006.

### What are your Open Issues?

If you don't want to be legally bound by the software, you can exclude yourself by sending \$6,000, or you won't be able to sue, or contract to sue. XYZ about the legal clauses in their case. You exclude yourself, you get money from this settlement. You may in the software, you may object to it by himself, \$6,000. The developer doesn't explain how to exclude yourself or

[illegible]

**www.XYZsettlement.com**

**1-800-000-0000**

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QUESTIONS? CALL 1-800-000-0000 TOLL FREE, OR VISIT [XYZSETTLEMENT.COM](http://XYZSETTLEMENT.COM)  
PARA UNA RESPUESTA EN ESPAÑOL, LLAMAR O VISITAR NUESTRO WEBSITE

# What's missing from the record

- Any expert testimony assuring notice is adequate
  - Language Barriers
  - Form and Content
- Any demonstration of reach
  - Notice to off-island class members
  - Class mobility (low-income and military)
- Any procedure for returned mailings
- Any information on mailings
  - How many (on v. off-island)
  - How many returned (on v. off-island)
  - How many different class members
  - 1998 mailings (number v. checks cashed v. additional claims filed)

# Information on Reach

“What is troubling . . . [is] class counsel [has] done no research and have not even attempted to present the court with information as to what type of notice would be reasonably likely to reach the most individual class members.”

*Carnegie v. Household International*, 371 F.Supp.2d 954 (N.D. Illinois, 2005)

# Address Updating

Failure to update addresses, where practicable, “would almost certainly” violate notice requirement.

*Parker v. Time Warner*, 239 F.R.D. 318 (E.D. New York, 2005)

Even in case cited by Governor, addresses were updated for returned mailings.

*In re Cherry’s Petition to Intervene*, 164 F.R.D 630 (E.D. Michigan, 1996)

Information regarding mailing and returned mailings is needed.

*In Integra Realty Resources, Inc.*, 262 F.3d 1089 (10<sup>th</sup> Cir. 2001)

**There is no basis on this  
record to find notice was  
the best practicable**

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# Disparate Treatment of Classes

- Heightened Scrutiny When Settlement is Pre-Certification.
- Legitimate Basis for Differences

“The distinction between the two groups . . . is legitimate because they are differently situated”

(2000)

7-Eleven Owners v. Southland, 85 Cal.App.4<sup>th</sup> 1135



# Arbitrary Caps For Each Tax Year

## \$8M Left Unpaid

Tax Year	Amount Available to Pay Claims	Value of Approved Claims	Amount Paid w/ Caps	Percent Recovery w/ Caps	Amount Returned to Gov. w/ Caps
1998	\$15,000,000.00	\$20,607,153.00	\$15,000,000.00	73.00%	\$5,607,153.00
1995, 1996, 1999 and 2000	\$15,000,000.00	\$17,520,013.00	\$15,000,000.00	86.00%	\$2,520,013.00
2001	\$15,000,000.00	\$6,814,932.00	\$6,814,932.00	100.00%	
2002	\$15,000,000.00	\$8,543,750.00	\$8,543,750.00	100.00%	
2003	\$15,000,000.00	\$8,839,433.00	\$8,839,433.00	100.00%	
2004	\$15,000,000.00	\$15,575,586.00	\$15,575,586.00	100.00%	
<b>Totals</b>	<b>\$90,000,000.00</b>	<b>\$77,900,867.00</b>	<b>\$69,773,701.00</b>		<b>\$20,226,299.00</b>
Tax Year	Amount Available to Pay Claims	Value of Approved Claims	Amount Paid w/out Caps	Percent Recovery w/out Caps	Amount Returned to Gov. w/out Caps
1998	\$15,000,000.00	\$20,607,153.00	\$20,607,153.00	100.00%	
1995, 1996, 1999 and 2000	\$15,000,000.00	\$17,520,013.00	\$17,520,013.00	100.00%	
2001	\$15,000,000.00	\$6,814,932.00	\$6,814,932.00	100.00%	
2002	\$15,000,000.00	\$8,543,750.00	\$8,543,750.00	100.00%	
2003	\$15,000,000.00	\$8,839,433.00	\$8,839,433.00	100.00%	
2004	\$15,000,000.00	\$15,575,586.00	\$15,575,586.00	100.00%	
<b>Totals</b>	<b>\$90,000,000.00</b>	<b>\$77,900,867.00</b>	<b>\$77,900,867.00</b>		<b>\$12,099,133.00</b>

## Waiver of Interest Unfair to 2001-2004 Claims

**“An advantage to the class, no matter how great, simply cannot be bought by the uncompensated sacrifice of claims of [other class] members”**

*National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 19 (2nd Cir. 1981).

“...the decision to forgo a claim for interest was weighed and leveraged in the settlement negotiations, particularly against the backdrop of a potential statute of limitations bar to recovery for the earlier class years.” Santos Reply to Objections at 4

# Waiver of Interest

## Unfair to older tax years

- Conflict between subclasses
  - Potentially time barred claims (already discounted for risk) are affected more than non-time barred claims
- Conflict w/in subclasses
  - 2001 claims are no different than 2004 claims but suffer more loss of interest
  - Nothing in the record supports Government's claim that waiver of past and future interest balances out these disparities.

# Potentially Time Barred Claims

## Overly Discounted

- Waiver of interest is a greater loss for these claims
- Available settlement funds for these claims are only 25% of funds available for non-time barred years
- Yearly caps mean no opportunity for funds from undersubscribed years to cover over subscription.

# Tax Year 2000 Claims Are No Different Than 2001-2004 Claims

- Tax year 2000 claims are not potentially time barred
- §6511– Tolloed under *American Pipe*  
*American Pipe* is procedural not equitable  
*Brockamp*'s bar of equitable tolling does not apply
- §6532–Bars all tax years or none

If waived , Government cannot selectively waive.

# The Settlement Creates Conflict

- Conflict Is Unfair
- Conflict Prevents Class Certification

# What's wrong with this settlement ?

- Inadequate Notice
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# Actual Settlement Payout

Tax Year	No. of Claims Approved	Value of Approved Claims	Average Value of Claims	Amount Available Under the Settlement	Total Paid Out After Application of 20% Offsets	Total Paid Out After Application of 20% Offsets
1998	12,616	\$20,607,153.00	1,633.41	\$15,000,000.00	15,000,000.00	12,000,000.00
1995	1,693	\$2,510,356.00	1,482.79	\$3,750,000.00		
1996	1,880	\$3,063,445.00	1,629.49	\$3,750,000.00		
1999	3,185	\$5,793,109.00	1,818.87	\$3,750,000.00		
2000	3,347	\$6,153,103.00	1,838.39	\$3,750,000.00		
Sum of 1995, 1996, 1999, and 2000	10,105	\$17,520,013.00	1,733.80	\$15,000,000.00	15,000,000.00	12,000,000.00
2001	3,617	\$6,814,932.00	1,884.14	\$15,000,000.00	6,814,932.00	5,451,945.60
2002	4,124	\$8,543,750.00	2,071.71	\$15,000,000.00	8,543,750.00	6,835,000.00
2003	4,185	\$8,839,433.00	2,112.17	\$15,000,000.00	8,839,433.00	7,071,546.40
2004	7,406	\$15,575,586.00	2,103.10	\$15,000,000.00	15,575,586.00	12,460,468.80
Totals	42,053	\$77,900,867.00	1,852.44	\$90,000,000.00	69,773,701.00	55,818,960.80



# Inadequate Record to Find the Settlement Fair and Adequate

- The Court may not approve a settlement if the record presented by the settling parties does not allow the Court to give due consideration to the relevant facts.

*Mandujano v. Basic Vegetable Products, Inc.*, 541 F. 2d 832 (9th Cir. 1976)

“the court must first compare the likely recovery that plaintiffs would have realized if they had gone to trial with the terms of the settlement.”

*Pigford v. Veneman*

# The Settlement Is Unfair

- Inclusion of 1998 checks with notice is coercive and defeats the essential purpose – to inform class members so they can make a reasoned choice.

In re Educational Testing Service, 447 F.Supp. 612 (E.D. La. 2006)

- Treatment of Offsets – 20% of claims value is retiring Government debt AND accumulated interest

# The Settlement Is Not Adequate

- 72% of the estimated potential claims will be extinguished for no compensation
- \$8M of filed and approved claims will not be paid
- 27% of claims have been denied with no oversight
- \$20-30M of the Settlement Fund reverts back to the Government
- Government cannot transform harm to the class as a whole from a low subscription rate to a benefit of greater recovery for the few who filed claims

# What's wrong with this settlement ?

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# The Funding Mechanism is Illegal

■ 48 U.S.C. §1421i provides:

“When any judgment against the government of Guam under this paragraph has become final, the Governor shall order the payment of such judgments out of any unencumbered funds in the treasury of Guam.”

“The word ‘shall’ is ordinarily the language of command”

*Anderson v. Yungkau*, 320 U.S. 482 (1947)

“...the term ‘shall’ normally creates an obligation impervious to judicial discretion.”

*U.S. v. Quirante*, 486 F.3d 1273 (11<sup>th</sup> Cir. 2007)

# The Settlement Funds Are Encumbered

- . . . . An encumbrance [is . . . .] a legal obligation . . . to pay creditors other than the government . . . or “restrictions imposed by a creditor.”

*Purcell v. U.S.*, 1 F.3d 932 (9th Cir. 1993)

e.g. Farmers Home Loan for courthouse requires fines received by the government to be used to discharge the debt

- Mere appropriation by the Legislature is not an encumbrance.

# Uncertainty of Funding

## Will Claims Be Paid ?

- The Government failed to reserve \$15 million by the date of the fairness hearing.
- Under the current rate it will take 5-10 years to pay all claims.
- Trust Fund laws can be repealed.

# Will The Claims Be Paid?

- “No promise is made that any particular amount will be in the funds at any time or paid at any time.”

Governor’s Reply at 30

- According to Black’s Law Dictionary this is an Illusory promise:  
“A purported promise that actually promises nothing because it leaves to speaker the choice of performance or nonperformance.”



# EXTRA SLIDES

# Inadequate compensation

- Settlement value is only 30% of claim value (based on \$278M claim value and \$90M made available)
- Settlement Value is only 20% of claim value (based on \$ 56M to actually be paid out)
- No basis to assume probability of success is only 20- 30% in light of *Simpao* summary judgment

# Court Must “Explore these factors Comprehensively:”

- 1) The risk, expense and complexity and duration of continued litigation
- 2) Risk of maintaining class action through trial
- 3) Amount of Settlement Offer
- 4) Extent of Discovery Completed
- 5) The Experience and Views of Counsel
- 6) Class Member Reactions
- 7) All other relevant factors

# What is known indicates settlement not “fair, reasonable and adequate”

- Only 2/3 of “Settlement Fund” actually being paid, Government keeps \$20 million
- Under subscription: only 28% of (estimated) class of taxpayers denied EITC will be paid at all
- All claims are substantially compromised due to denial of interest and time

# Prior To Objections Settling Parties Had Not Told Court:

- 1) Value of Claims and amount discounted
- 2) Amount Government would actually pay and offset amount
- 3) Number of Claimants vs. Claims
- 4) Distribution of claims over years
- 5) Government's ability to fund settlement
- 6) Strength of Class' case and risks of continued litigation
- 7) Reach of notice publications
- 8) Number of mailings
- 9) Number of mailings undeliverable
- 10) Procedures for dealing with undeliverable
- 11) Sample of mailings including envelopes
- 12) Experience of 1998 class

# Compare information regarding notice reach here to case cited by Governor:

- Record indicated:
  - Number of mailings
  - Number and time period of TV commercials and directed at potential class members
  - Number and time period of radio advertisements and directed at potential class members
  - Facilitator's reach data including estimation that media notice reached 87% of class members with an average frequency of 2.4 times
  - Number of phone calls fielded from class members
  - Number of information meetings held
  - Class counsel's testimony that "I don't know of any class action where notice was more complete than in this case."

*Pigford v. Veneman*